Comments of
National Consumer Law Center (on behalf of its low income clients)
Americans for Financial Reform
Center for Responsible Lending
Consumers Union
National Association of Consumer Advocates
Public Citizen
U.S. PIRG
To
Office of the Comptroller of the Currency (OCC)
On Regulatory Review under the Economic Growth
and Regulatory Paperwork Reduction Act of 1996
12 C.F.R. Chapter I
Docket ID FFIEC-2014-001
Regarding
12 CFR parts 7, 34, 150 (preemption regulations)
79 Fed. Reg. 32172 (June 4, 2014)
Submitted Sept. 2, 2014

The National Consumer Law Center, on behalf of its low income clients, Americans for Financial Reform, Center for Responsible Lending, National Association of Consumer Advocates, Public Citizen and U.S. PIRG[1] submit these comments in response to the Office of the Comptroller of the Currency's (OCC) request for the public to identify regulations that are outdated, unnecessary, or unduly burdensome for insured depository institutions the following three categories: Applications and Reporting, Powers and Activities, and International Operations.

We submit these comments to make two points. First, regulations should not be reviewed for potential burden on financial institutions without also reviewing them for updates and additions needed to strengthen consumer protection. Second, the OCC's preemption regulations are outdated and should be repealed or revised to be consistent with the OCC's narrow preemption authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").

Review of Regulations

The OCC has solicited comments on whether regulations are outdated, unnecessary or unduly burdensome in order to comply with the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA). The question posed is a one-sided inquiry, and the request did not ask a much more important question: are there areas where regulations are insufficient to protect consumers, small businesses and the general public? The financial crisis and other events of the last several years have made clear that the real problem in this country is the lack of adequate regulations, not too much

[1] Organizational descriptions are attached as Exhibit 1.

regulation. Stronger consumer protection regulations would have saved consumers, financial institutions, and the entire economy billions of dollars, far more than compliance with the regulations could ever cost.

Memories are astonishingly short. Certainly, regulations should be carefully crafted to minimize the costs of compliance for institutions of all sizes, while remaining sufficiently strong to accomplish their purposes. But it is essential not to forget that anti-regulatory fervor and the resistance to consumer protection rules in the end harms not only consumers but financial institutions as well.[2]

Preemption Regulations are Outdated

There is one area up for review, however, where the regulations are clearly outdated: preemption.[3] We urge the OCC to repeal or substantially review its final rules implementing the preemption amendments and Office of Thrift Supervision integration provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010: 12 C.F.R. §§ 7.4007, 7.4008, 7.4009, 34.4 and 150.136.

The final rules ignore the mandate of Congress and give national banks immunity from state laws protecting consumers from abusive practices in areas including mortgages, credit cards, overdraft fees and other areas.

The final rules ignore numerous Supreme Court decisions confirming that national banks are subject to nondiscriminatory state laws. The rules violate several aspects of the Dodd-Frank Act:

---

[2] For example, it is for this reason that we support strengthening of the data reported on Call Reports because of the heightened safety and soundness concerns associated with some fees and products. *See, e.g.,* Comments of NCLC to Department of the Treasury, Office of the Comptroller of the Currency (Attn: 1557-0081), Federal Reserve System (Consolidated Reports of Condition and Income, FFIEC 031 & 041; OMB Number 7100-0036), Federal Deposit Insurance Corp. (Consolidated Reports of Condition and Income, 3064-0052) On Proposed Agency Information Collection Activities (submitted March 3, 2014), attached as Exhibit 2 available at http://www.nclc.org/images/pdf/rulemaking/nclc_comments_info_collection_03032014.pdf; Comments of Center for Responsible Lending to Federal Reserve Board, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency on Proposed Agency Information Collection Activities (submitted Feb. 21, 2013), attached as Exhibit 3 and available at http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/center-for-responsible-lending_comment-call-report-data-2013_final.pdf.

[3] EGRPRA calls for banking regulators to regularly review their regulations to identify those that are "outdated", "unnecessary", or "unduly burdensome." 12 U.S.C. § 3311. By definition, a rule that is contrary to the law, such as the OCC's preemption rules, is both outdated and unnecessary. Furthermore, the preemption rules create an atmosphere of regulatory uncertainty that burdens regulated entities. We believe that the preemption rules are significantly vulnerable to legal challenge if raised as a defense by an OCC-regulated entity sued under state law. This legal uncertainty burdens the OCC's regulated entities, rather than providing them with a stable regulatory framework that would allow them to minimize their compliance costs. A bank operating in the current regulatory atmosphere does not know if it will ultimately be subjected to state law, or to the OCC's preemption rule. Finally, state regulation can help reduce burdens on financial entities by preventing the systemic risk that created the financial crisis.

- The rules' sweeping preemption of broad fields of state law governing deposit-taking and lending violate the Dodd-Frank provision making clear that the OCC cannot "occupy the field in any area of State law" and can preempt "only if" the OCC determines on a "case-by-case basis" that a "particular" state law, or a substantially equivalent one, prevents or significantly interferes with the exercise of bank powers.
- The OCC re-adopted its prior preemption rules largely intact, ignoring the fact that the Dodd-Frank grandfather clause preserves prior OCC regulations only for contracts entered into before July 22, 2010.
- The OCC failed to use the congressionally mandated standard that a state law is preempted "only if" the state law "prevents or significantly interferes" with the exercise of bank powers.
- Dodd-Frank makes clear that "no regulation or order" of the OCC may preempt state law "unless substantial evidence, made on the record of the proceeding" supports the OCC's finding that a particular state law is preempted. The OCC offered no evidence, produced no record, and held no proceeding to justify re-promulgating its prior preemption rules.
- The revised rule preempting state laws as applied to federal savings associations that act as a fiduciary, 12 C.F.R. § 150.136, is outside of the OCC's authority, and the OCC failed to justify the rule under either the Home Owners Loan Act or the Dodd Frank Act.[4]

Lax oversight by the OCC and other federal bank regulators contributed greatly to the financial crisis. The preemption rules fail to learn from history: states are partners and should be treated as regulatory allies, not hindrances. Restoring states' role as first responders on the front lines of protecting consumers from unfair bank practices is an essential element of financial reform.

More detail about the problems with the preemption regulations is available in our 2011 comments on the preemption rules, which are attached.[5] We also urge the OCC to revisit the preemption regulations in light of the importance of restoring states' roles as first responders.[6]

There are also a number of other OCC regulations that preempt stronger state laws, which we urge the OCC to substantially review:

- The OCC should update 12 C.F.R. § 7.5002(c) regarding electronic services to remove the outdated language that preempts state laws that "stand as an obstacle to the ability of national banks to exercise uniformly their Federally authorized powers …" The outdated "obstacle" preemption standard, and preemption of state laws that impact uniformity, are inconsistent with the Dodd-Frank preemption rules.

---

[4] The Center for Responsible Lending has not had an opportunity to develop a position on revision of the fiduciary preemption regulation.

[5] The 2011 general preemption comments are attached as Exhibit 4 and are also available at http://www.nclc.org/images/pdf/preemption/occ-preemption-comments-6-27-11.pdf. The 2011 fiduciary preemption comments are attached as Exhibit 5 and are available at http://www.nclc.org/images/pdf/preemption/occ_fiduciary_preemption_comments_nclc_10112014.pdf.

[6] National Consumer Law Center, "Restore the States' Traditional Role as 'First Responder'" (Sept. 2009), available at http://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf.

- The OCC should revise the rule that gives national banks discretion to charge non-interest fees, 12 C.F.R. § 7.4002, to ensure that it is not read to preempt state laws in a manner inconsistent with the Dodd-Frank preemption standard.[7] The OCC should also revisit the overbroad definition of "interest" in 12 C.F.R. § 560.110 that unnecessarily preempts state laws governing certain fees that are not interest in any real sense of the word.
- The OCC should revise its regulation on debt suspension and cancellation products, 12 C.F.R. Part 37, to roll back preemption of state law insurance protections for these products. Furthermore, the OCC should strengthen the protections in Part 37 itself. Given that the CFPB's first enforcement actions were against credit-card issuing national banks for abuses in the sale of debt suspension products, these protections appear to need bolstering.

Thank you for the opportunity to submit these comments.

Yours very truly,

National Consumer Law Center, on behalf of its low income clients
Americans for Financial Reform
Center for Responsible Lending
Consumers Union
National Association of Consumer Advocates
Public Citizen
U.S. PIRG

[7] For example, based on that regulation and related interpretive letters, the Ninth Circuit has held that state laws against unfair and deceptive practices are preempted as applied to the patently unfair and deceptive practice of reordering bank account transactions for the purpose of increasing overdraft fees. *See* Gutierrez v. Wells Fargo Bank, NA, 704 F.3d 712 (9th Cir. 2012).

Exhibit 1: Descriptions of Commenters

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

Americans for Financial Reform is an unprecedented coalition of over 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups.

The **Center for Responsible Lending (CRL)** is a not-for-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, which consists of a state-chartered credit union (Self-Help Credit Union (SHCU)), a federally-chartered credit union (Self-Help Federal Credit Union (SHFCU)), and a non-profit loan fund.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

The **National Association of Consumer Advocates (NACA)** is a nonprofit association of more than 1,500 consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

Public Citizen is a national non-profit organization with more than 225,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

U.S. Public Interest Research Group (U.S. PIRG) serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending, student loans, credit report accuracy, privacy of customer information (including data breaches) and, generally, any unfair and deceptive practices.

EXHIBIT 2

Comments of
National Consumer Law Center
(on behalf of its low income clients)
To
Department of the Treasury, Office of the Comptroller of the Currency (Attn: 1557-0081)
Federal Reserve System (Consolidated Reports of Condition and Income, FFIEC 031 & 041; OMB Number 7100-0036)
Federal Deposit Insurance Corp. (Consolidated Reports of Condition and Income, 3064-0052)
On
Proposed Agency Information Collection Activities (consumer deposits; bank fees; remittance transfers)
79 Fed. Reg. 2509 (Jan. 14, 2014)

Submitted March 3, 2014

On behalf of our low income clients, the National Consumer Law Center[1] submits these comments in response to the proposed Call Report requirement submitted by the Office of the Comptroller of the Currency (OCC), Federal Reserve Board (FRB) and Federal Deposit Insurance Corp. (FDIC) to the Office of Management and Budget. In particular, we commend the OCC, FRB, and FDIC (collectively "Agencies") for their decision to move forward with their proposal to require institutions to report data on consumer deposit account balances; on service, overdraft and ATM fees; and on remittance transfers. This data is essential to the ability of the Agencies and other regulators to conduct their consumer protection and safety and soundness supervision.

We are especially supportive of the Agencies' decision to require reporting of data on overdraft, monthly maintenance, and ATM fees. However, we are disappointed that the reporting requirements have been revised to exclude institutions with less than $1 billion in total assets. We believe that overdependence on problematic fees is especially troubling and dangerous for smaller institutions.

[1] Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC publishes a series of consumer law treatises, including Consumer Banking and Payments Law. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. These comments were written by Lauren Saunders, Managing Attorney of NCLC's Washington, DC office and Chi Chi Wu.

I. Importance of Reporting Consumer Deposit Service Charges

Bank fees are often a sore spot for consumers. Some fees are merely the price of a product or of an optional service, and are not necessarily problematic as long as the fees are clearly and conspicuously disclosed and are simple enough to understand. But fees can also be a backhanded way of obscuring the price of a product and tricking consumers into paying much more than they understood or desired. Bank regulators can look out for problematic fee practices only if they have information about the fees that consumers are incurring.

Thus, we support the data collection requirements for financial institutions to specifically provide separate information on the three important categories of service charges: overdraft-related charges, monthly maintenance charges, and automated teller machine (ATM) charges. We agree that data on all three categories is important to both consumer protection and safety and soundness.

A. *Overdraft Fees*

Overdraft fee practices by many banks have become increasingly abusive over the last couple of decades. Overdrafts should never have become a predatory form of credit. Fee-based overdraft programs should only be used as an occasional courtesy to cover a mistake on an important payment, and not as a subversive way of tricking consumers into credit at the equivalent of triple- or even quadruple-digit APRs. While the 2010 Regulation E changes may have had some beneficial effect, responses by institutions have varied widely, and regulators simply must understand the extent to which banks are collecting significant overdraft fees from their consumer customers. Data on overdraft fees will help the Agencies and other regulators address abusive practices.

B. *Monthly Maintenance Fees*

Information on monthly maintenance charges is also important. There is nothing inherently wrong with a monthly bank account fee. Problems arise when the fee is either too high or too low. The squeeze on interchange fees and, to a lesser extent, overdraft fees has led many banks to increase their monthly charges or make those charges harder to avoid. For some consumers, higher fees may be driving them out of the banking system.

But on the other end of the spectrum, both banks and consumers have become overly reliant on the often false or unequal promise of "free checking." Checking accounts cost money, and they provide a service that consumers should be willing to pay for. But the competition to offer "free checking" and the allure of that promise has led to a situation where banks must recoup their costs in less transparent and more abusive back end fees. Back end fees also fall disproportionately on a small number of consumers, with the consumers who can least afford high fees subsidizing free checking for many others.

Understanding the maintenance fees that banks are charging consumers can help regulators assess whether the institution is engaged in the proper balance of fees that cover their costs and pricing practices that are not overly reliant on penalty fees. Regulators can also do their job better if they are able to identify successful strategies to cover the costs of accounts without either limiting access to those accounts or relying on back end fees.

C. *ATM Fees*

Finally, information on ATM fees is also important. ATMs are increasingly important to consumers' access to the banking system. But that access can come at a cost. That cost is especially difficult to bear for lower income consumers, including those reliant on public benefits, who often need to pay to access their scarce funds. The growth of the prepaid card market, with its different ATM pricing model, also has varying impacts on consumers' ability to access their funds. Information on the ATM fees that consumers are paying will help bank regulators play their role in supervising the banking system and ensuring that it works for consumers and banks alike.

II. Importance of Data for Safety and Soundness and Consumer Protection

Information about the fees that consumers are paying is important not only to consumer protection but also to reviewing the safety and soundness of a financial institution. Overdependence on one form of income can jeopardize the safety of a bank. This is especially true if the fees are problematic from a consumer protection point of view and may be the target of regulatory activity.

Addressing overdependence on problematic fees ensures both safety and soundness and consumer protection. Regulators should not be forced to choose between correcting consumer protection abuses and preserving income that a bank depends on. The data requested will enable bank regulators to identify and address overdependence on problematic fees.

The fact that banks make their fee schedules available to consumers and disclose their service charges does not change the fact that aggregate data is essential. For example, two banks can have identical overdraft fees, but one may engage in a number of complicated and subtle practices that push consumers into incurring overdraft fees, and the other may work to minimize overdraft fees and to help consumers find safer and less costly ways of covering shortfalls. Discrepancies in the amount of different categories of fees charged at different banks can help regulators identify problematic practices.

III. Reporting Fee Information is Even More Important for Smaller Institutions

Information about fee practices is even more critical in the regulation of smaller institutions. Many smaller banks are closer to the consumers they serve and less likely to engage in abusive practices than larger banks. But smaller banks can also be much more dependent on fee income and can get swept up in the desire to maximize those fees even when the fees harm consumers. Indeed, smaller banks, with the encouragement of third-party vendors, were some of the first to adopt aggressive automated overdraft programs and actively promote the ability of consumers to overdraw their accounts.

Questionable fees can be a disproportionate amount of a small bank's income. Regulators simply must identify overdependence on problematic fees by small banks in order to preserve the banks' safety and soundness.

EXHIBIT 3

Comments to the

Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Office of the Comptroller of the Currency, Treasury

Document Number 2013-04035
78 Federal Register 12141 (February 21, 2013)

Proposed Agency Information Collection Activities

by

Center for Responsible Lending

The Center for Responsible Lending (CRL) is a not-for-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, which consists of a state-chartered credit union (Self-Help Credit Union (SHCU)), a federally-chartered credit union (Self-Help Federal Credit Union (SHFCU)), and a non-profit loan fund. SHCU has operated a North Carolina-chartered credit union since the early 1980s. Beginning in 2004, SHCU began merging with community credit unions that offer a full range of retail products. In 2008, Self-Help founded SHFCU to expand Self-Help's mission. CRL has consulted with Self-Help's credit unions in formulating these recommendations.

I. Introduction

We welcome the proposal by the Federal Reserve Board (the Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) (collectively, the Agencies) to revise Call Report requirements to include separate reporting of overdraft-related fees.

As the Agencies note, Call Report data is used for "monitoring the condition, performance, and risk profile of individual institutions and the industry as a whole," including "identifying areas of focus for on-site and off-site examinations . . . and other public policy purposes."[1] We limit the scope of our comments to the reporting of overdraft-related fees and revenue derived from bank payday lending, or "deposit advance" products, both of which warrant heightened attention from examiners because they pose clear safety and soundness and policy concerns.

Summary of Recommendations:

Overdraft-related fees:

- We support the Agencies' proposed requirement that banks report overdraft-related fees as a separate component of service charge income.

- We urge that the Agencies require banks to report separately the two components of overdraft-related fees: overdraft fees (fees charged on paid items) and non-sufficient funds (NSF) fees (fees charged on unpaid items).

- We urge that the Agencies require banks to report overdraft fees triggered by debit card purchases and automated teller machine (ATM) transactions separately from overdraft fees triggered by checks and automated clearinghouse (ACH) transactions.

Bank payday lending revenue:

- We urge that the Agencies require revenue derived from bank payday lending, or "deposit advance" products, be reported as its own Call Report line item.

II. Overdraft-related Fees

A. The Agencies should require that overdraft-related fees be reported as a separate component of service charge income.

The Agencies explain that greater understanding of overdraft fees is "necessary to assess institutional health and enhance the understanding of the costs and potential risks

[1] 78 Fed. Reg. 12142.

financial services pose to consumers."[2] Both the empirical and regulatory records clearly support this need.

Overdraft fees are a leading cause of involuntary bank account closures and a significant cause of voluntary account closures, demonstrating they pose significant risks to both banks and consumers.[3] Accordingly, the Agencies have expressed concerns about high-cost overdraft programs for well over a decade. In 2001, the OCC declined to issue a comfort letter related to a bank's proposed high-cost overdraft program, instead identifying a host of concerns.[4] In 2005, the Agencies' joint guidance raised safety and soundness and consumer protection concerns with overdraft programs.[5] In 2009, the Board's rulemaking came in response to exploding volumes of overdraft penalty fees being triggered by debit card and ATM fees.[6] In 2010, the FDIC identified continuing problems in the wake of the Board's rule and issued additional guidance addressing both safety and soundness and consumer protection concerns.[7]

---

[2] 78 Fed. Reg. 12146

[3] A survey in the Detroit area found that among those surveyed who formerly had a bank account, 70 percent chose to close the account themselves, citing moving, worrying about bouncing checks, and excessive fees as their reasons for closing the account. The remaining formerly banked, 30 percent, reported that their bank closed their account; the primary reason was bounced checks and overdrafts. *See* Michael S. Barr, *Financial Services, Savings and Borrowing Among Low- and Moderate-Income Households: Evidence from the Detroit Area Household Financial Services Survey* 12, (Mar. 30, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121195##. The FDIC's most recent survey of unbanked and underbanked households found that, of formerly banked households whose bank had closed their account, almost half (45.8 percent) of them had their account closed because of overdrafts or bounced checks. FDIC, *2011 National Survey of Unbanked and Underbanked Households* (Sept. 2012), *available at* http://www.fdic.gov/householdsurvey/2012_unbankedreport.pdf. *See also* Dennis Campbell, Asis Martinez Jerez, and Peter Tufano, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures* 6, (June 6, 2008), *available at* http://www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf (noting that virtually all involuntary bank account closures, when the financial institution closes a consumer's account, occur because the customer overdrew the account an excessive number of times).

[4] OCC, Interpretive Letter # 914 (Aug. 3, 2001), *available at* http://www.occ.gov/static/interpretations-and-precedents/sep01/int914.pdf. In declining to provide a bank a "comfort letter" regarding an overdraft program, the OCC identified a host of compliance, consumer protection, safety and soundness, and "policy issues," (e.g., "banks participating in the Program will, in essence, attempt to entice their customers to write NSF checks more frequently and on purpose in order to generate fee income").

[5] OCC, Board, FDIC, and National Credit Union Administration, *Joint Guidance on Overdraft Protection Programs*, 70 Fed. Reg. 9127 (Feb. 24, 2005); FDIC, *Supervisory Guidance for Overdraft Protection Programs and Consumer Protection*, FIL-81-2010 (Nov. 24, 2010).

[6] Federal Reserve Board, Final Rule, Electronic Funds Transfers, Regulation E, Docket No. R-1343, 74 Fed. Reg. 59033 (Nov. 17, 2009).

[7] FDIC, Financial Institution Letters, FIL 81-2010, *Overdraft Payment Programs and Consumer Protection* (Nov. 24, 2010).

Despite this long record of regulatory concern, overdraft fees continue to amount to billions of dollars annually, in part because many banks continue to engage in practices that maximize them. These include charging fees on debit card and ATM transactions—which could easily be declined when the account lacks sufficient funds at no cost to the consumer—and posting certain transactions in order from largest to smallest to deplete the account more quickly and trigger more fees. In 2012, the CFPB expressed concerns about overdraft practices and began collecting information from the largest banks.[8] The prudential regulators should understand what portion of their supervisee banks' service charges income is comprised of fees that remain the subject of intense regulatory scrutiny.

Moreover, including overdraft fees as an unsegregated part of the larger service charge income line item allows the volume of overdraft fees to remain unknown. This in turn incents some banks to continue to engage in practices that maximize overdraft fees. More action is needed to address overdraft fees, and one appropriate next step is greater transparency.

B. The Agencies should further require that banks report separately the two components of overdraft-related fees: overdraft fees (fees charged on paid items) and non-sufficient funds (NSF) fees (fees charged on unpaid items).

Overdraft fees and non-sufficient funds (NSF) fees are different in nature, pose different safety and soundness concerns, and require differently tailored policy responses. To provide adequate transparency around these fees, the Agencies should require that they be reported separately on the Call Report.

Since overdraft fees are charged when the bank pays a transaction instead of declining it, they are a fee charged in connection with a credit transaction. And while traditionally, overdraft fees were charged only on paper checks, they are now triggered not only by paper checks and electronic automated clearing house (ACH) transactions, but also by debit card and ATM transactions.

On the other hand, NSF fees are charged when the bank declines, rather than pays, a check or ACH transaction when the account lacks sufficient funds. Thus, they are not associated with a credit transaction. They also are not typically triggered by debit card or ATM transactions.[9]

---

[8] CFPB, Request for Comment on Impacts of Overdraft Programs on Consumers, 73 Fed. Reg. 12031 (Feb. 28, 2012); *see also* Richard Cordray, Director, CFPB, Prepared Remarks, CFPB Roundtable on Overdraft Practices, New York, New York (Feb. 22, 2012), *available at* http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-at-the-cfpb-roundtable-on-overdraft-practices/.

[9] In its final Regulation E rule in November 2009, the Board indicated that such a practice would raise unfairness concerns: "A few commenters suggested the possibility that financial institutions may create new fees for declining ATM or one-time debit card transactions. While the final rule does not address declined transaction fees, the Board notes that such fees could raise significant fairness issues under the

The Agencies' approach to overdraft programs in other contexts supports evaluating overdraft fees separately from NSF fees. The 2005 joint guidance and the 2010 FDIC guidance both address overdraft fees without addressing NSF fees. Moreover, the Board's approach to Regulation DD supports not only the merits of distinguishing between overdraft and NSF fees, but also the operational feasibility of doing so. The Board requires institutions to report overdraft fees and NSF fees, both period-to-date and calendar year-to-date, on customers' periodic statements as two separate line items; it explains this requirement generally as intending to help customers better understand the costs associated with their account.[10] In developing Regulation DD, the Board recognized that overdraft and NSF fees tell consumers distinct information about how their transactions are being handled; likewise, they tell regulators distinct information about how banks are managing overdraft programs. They are relevant not only in their absolute volumes, but also in their ratio to each other.

C. The Agencies should also require that banks report overdraft fees triggered by debit card purchases and ATM transactions separately from overdraft fees triggered by checks and ACH transactions.

As the federal regulators have long recognized, overdraft fees triggered by debit card and ATM transactions are fundamentally different from those triggered by checks and ACH transactions. An institution can typically decline debit card and ATM transactions when the customer lacks sufficient funds, and the customer incurs neither an NSF fee nor a merchant fee, which declined checks or ACH transactions may trigger. Indeed, less than a decade ago, 80 percent of financial institutions simply declined debit card and ATM transactions when the account lacked sufficient funds.[11]

The Agencies' regulatory responses to these overdraft fees have also been different. The Agencies' 2005 joint guidance strongly suggested that overdraft fees on debit card and ATM transactions were inappropriate, advising banks to consider limiting overdraft fees to check transactions.[12] The Board's 2009 rule required that banks obtain customers' opt-in before charging overdraft fees on debit card and ATM transactions in part because, unlike for checks and ACH transactions, customers incur no fee when these transactions are simply declined.[13]

FTC Act, because the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction." Federal Reserve Board, Final Rule, Electronic Funds Transfers, Regulation E, Docket No. R-1343, 74 Fed. Reg. 59033, 59041 (Nov. 17, 2009).

[10] 74 Fed. Reg. 5587.

[11] Mark Fusaro, *Are "Bounced Check Loans" Really Loans?*, note 4, at 6 (noting 20 percent of institutions in June 2004 were applying "bounce protection" to debit cards or ATM) (Feb. 2007).

[12] 70 Fed. Reg. 9132: "Institutions should consider making access to the overdraft protection program unavailable through means other than check transactions, if feasible."

[13] 74 Fed. Reg. 59035.

The Board's rule resulted in a significant shift in the marketplace, as some banks, including the largest debit card issuer, Bank of America, stopped charging overdraft fees on debit card purchases altogether.[14] HSBC also stopped doing so, and Citibank never has.[15] Among banks that do charge overdraft fees on debit card and ATM transactions, the portion of the bank's total overdraft fees triggered by those transactions could differ dramatically depending on the portion and make-up of customers' "opt-in"s the bank has obtained.[16]

Given how policy responses to date have differed with respect to overdraft fees on debit card and ATM transactions, how future policy responses may differ, and how significantly this subset of overdraft revenue may vary across institutions, it is important that the prudential regulators understand what portion of banks' overdraft fees are triggered by these transactions.

II. Bank Payday Lending Revenue: The Agencies should require that revenue derived from bank payday lending be reported as its own Call Report line item.

A handful of large banks—Wells Fargo Bank, U.S. Bank, Fifth Third Bank, Regions Bank, and Bank of Oklahoma and its affiliates[17]—are making payday loans they call deposit advances. These banks deposit the loan amount directly into the customer's account and then repay themselves the loan amount, plus a very high fee, directly from the customer's next incoming direct deposit of wages or public benefits. If the customer's direct deposits are not sufficient to repay the loan, the banks typically repay themselves anyway within 35 days, even if the repayment overdraws the consumer's account, triggering high fees for subsequent overdraft transactions.

Payday loans pose severe safety and soundness and public policy concerns, as the Agencies have long acknowledged.[18] Banks making payday loans do so without regard

---

[14] Transcript, Brian Moynihan, CEO, *Bank of America Q3 2010 Earnings Call* (Oct. 19, 2010), *available at* http://www.morningstar.com/earnings/18372176-bank-of-america-corporation-bac-q3-2010.aspx.

[15] Consumer Federation of America, Survey of OCC Bank Overdraft Loan Fees and Terms (July 2011).

[16] For example, many banks may have relatively low opt-in rates but may have targeted their marketing encouraging "opt-in" to those customers who overdraw most frequently, thereby retaining a large portion of their debit card overdraft revenue. *See* Center for Responsible Lending, *Banks Target, Mislead Consumers As Overdraft Deadline Nears*, Center for Responsible Lending (Aug. 5, 2010), *available at* http://www.responsiblelending.org/overdraft-loans/research-analysis/Banks-Target-And-Mislead-Consumers-As-Overdraft-Dateline-Nears.pdf; Center for Responsible Lending Research Brief, *Banks Collect Opt-Ins Through Misleading Marketing* (Ap. 2011), *available at* http://www.responsiblelending.org/overdraft-loans/policy-legislation/regulators/banks-misleading-marketing.html.

[17] Bank of Albuquerque, Bank of Arizona, Bank of Arkansas, Bank of Kansas City, Bank of Texas, and Colorado State Bank and Trust.

[18] OCC, Advisory Letter AL 2000-10, *Payday Lending* (Nov. 27, 2000); FDIC, Financial Institutions Letter FIL-14-2005, *Guidelines for Payday Lending* (Feb. 25, 2005). In 2003, a Board-supervised bank stopped

to the borrower's ability to repay the loan without reborrowing, a practice the prudential regulators have long recognized as unsafe and unsound.[19] Borrowers already struggling with regular expenses or facing an emergency expense with minimal savings are typically unable to repay the entire lump-sum loan and fees and meet ongoing expenses until their next payday. Consequently, though the payday loan itself may be repaid because the lender puts itself first in line before the borrower's other debts or expenses, the borrower must take out another loan before the end of the pay period, leading to a cycle of repeat loans. CRL's most recent analysis found that the median bank payday borrower took out 13.5 loans in 2011 and spent at least part of six months during the year in bank payday debt.[20] Over a third of borrowers took out more than 20 loans, bringing the mean number of loans per borrower to 19.[21]

In addition to violating the basic safety and soundness principle of lending based on a borrower's ability to repay a loan, bank payday loans also pose severe reputational risk, as evidenced by sweeping negative reaction to these products,[22] and risk violation of a range of laws, including laws prohibiting unfair and deceptive acts and practices and discriminatory credit practices.[23]

While the number of banks making these loans today remains small, there is risk that without definitive regulatory action, this product could spread rapidly. To enhance the Agencies' ability to evaluate the safety and soundness risk this product poses, the Agencies should require that revenue derived from this product to be separately reported on Call Reports.

Conclusion

We thank the Agencies for their recognition that overdraft-related fees warrant separate reporting on Call Reports. We urge further breakout of those fees into overdraft fees triggered by debit card purchases and ATM transactions; overdraft fees triggered by

---

partnering with a payday lender, citing in its Securities and Exchange Commission filing "materially increased regulatory requirements for participation in that line of business that the Bank does not believe it can satisfy." Republic First Bancorp Inc. (parent company of First Bank of Delaware), Form 8-K, June 27, 2003, *available at* http://www.secinfo.com/dsVsz.2hz.htm.

[19] OCC, Board, FDIC, and OTS, *Expanded Guidance for Subprime Lending Programs* (Jan. 31, 2001).

[20] Center for Responsible Lending, *Triple Digit Danger: Bank Payday Lending Persists* (March 21, 2013), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/Triple-Digit-Bank-Payday-Loans.pdf.

[21] *Id.*

[22] *See* Center for Responsible Lending, *Bank Payday Lending: Overview of Media Coverage and Public Concerns*, January 17, 2013, *available at* http://rspnsb.li/10wra0y.

[23] For further detail regarding the safety and soundness risk bank payday lending poses, *see* Center for Responsible Lending, *Prudential Regulators Should Apply Safety and Soundness Standards to Bank Payday Loan Products*, January 24, 2013, *available at* http://rspnsb.li/Yqd0uH.

checks and ACH transactions; and NSF fees. We further urge that, in light of safety and soundness risk posed by bank payday lending, Agencies require that this revenue be disclosed as a separate line item as well.

EXHIBIT 4

Center for Responsible Lending
Consumers Union
National Consumer Law Center (on behalf of its low income clients)
Public Citizen
Sargent Shriver National Center on Poverty law

June 27, 2011

Acting Comptroller John Walsh
Office of the Comptroller of the Currency
250 E Street, SW, Mail Stop 2-3
Washington, DC 20219

Re: OTS Integration; Dodd-Frank Implementation
Docket IS OCC-2011-0006
RIN 1557-AD41

Dear Comptroller Walsh:

We respectfully submit the following comments in response to the Office of the Comptroller of the Currency's proposed Dodd-Frank Act Implementation regulations, in particular the provisions relating to preemption of state law and the OCC's exclusive visitorial powers.

The proposed rules would continue the OCC's broad preemption of state laws governing mortgages, credit cards, bank accounts, and other banking products. Continuation of those rules ignores the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which restored the important role of states in protecting consumers. The visitation regulations also impermissibly narrow the range of enforcement actions states may take. We therefore respectfully urge that the OCC withdraw the current proposal, repeal the current preemption regulations, amend the visitation regulations, and proceed in accordance with the procedural and substantive requirements of the Dodd-Frank Act.

I. State Laws Play an Important Role In Protecting Consumers from Harmful Banking Practices

Consumer protection in the financial world has been dramatically weakened in the last several years by preemption of state consumer protection laws. Broad preemption of state law is a recent phenomenon. For most of the nearly 150 years since national banks were created, they have complied with state law. Preemption has harmed states' ability to respond to financial abuses in both the banking and the nonbank world. Restoring the states' role as "first responders" and as additional "cops on the beat" was an essential element of financial reform.

For most of this nation's history, consumers have depended on states, not the federal government, to protect them**.** Even in the banking world, national banks were expected to comply with state law.[1] Only in the last decade or so have federally chartered depositories been able to ignore state laws with impunity.[2]

The preemption of state laws in the mortgage area was a significant contributor to the mortgage crisis. In 2006, the peak year of irresponsible lending, national banks, federal thrifts, and their subsidiaries made 32% of subprime loans, 40% of Alt A loans, and 51% of interest-only and option ARM loans.[3] A total of over $700 billion in risky loans were made by entities that states could not touch. Until reversed by the Dodd-Frank Act,[4] states were also preempted from regulating *any* mortgage lender (bank or nonbank) on the very terms that made many mortgages dangerous: balloon payments, negative amortization, variable rates, and other nontraditional terms. Even where they retained some authority over nonbank mortgage lenders, states were reluctant to create an uneven playing field and to disadvantage their home state industries with rules that did not apply to national banks.

The credit card abuses that eventually led to a federal crackdown – bait and switch rate increases, abusive fees, payment manipulations – were allowed to take off and grow due to preemption. States were powerless to address credit card problems. Even simple, common-sense state rules – such as allowing payment without a late fee on Monday when the due date falls on a Sunday – were held preempted by federal bank regulations.[5]

Similarly, the preemption of state laws governing bank practices designed to induce overdraft fees permitted the banking industry to get ever more aggressive in designing intricate tricks and traps. The result was so-called "overdraft protection" – an unfair and inequitable back-end method of paying for bank account services and a $28 billion tax on the very consumers who need those funds the most.[6]

States are our nation's first responders when new threats target consumers. States see abuses sooner, react more quickly, and can address local problems before they become national ones.

---

[1] Even the NBA's usury preemption requires that national banks "borrow" the **state** law applicable to their home state's "most favored lender." 12 U.S.C. §85.

[2] *See generally* Lauren Saunders, National Consumer Law Center, "Restore The States' Traditional Role As 'First Responder'" (Sept. 2009), available at http://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf.

[3] *See id.*

[4] The Dodd-Frank Act repealed most of the Alternative Mortgage Transactions Parity Act. *See* Dodd-Frank § 1083, to be codified at 12 U.S.C. §§ 3802, 3803.

[5] *See* Miller v. Bank of Amer., 88 Cal. Rptr. 3d 723 (Cal. Ct. App. 2009).

[6] *See* Leslie Parrish, Center for Responsible Lending, Overdraft Explosion: Bank Fees for Overdrafts Increase 35% in Two Years (Oct. 6, 2009), available at http://www.responsiblelending.org/overdraft-loans/research-analysis/overdraft-explosion-bank-fees-for-overdrafts-increase-35-in-two-years.html.

State laws also provide the models for federal law. When new problems arise and the solutions are not clear, states can experiment with different approaches. Typically, states copy and improve on each other's responses and then coalesce around a particular solution. Eventually, federal rules are adopted that provide uniform protection that benefitted from that process of experimentation.

The creation of the Consumer Financial Protection Bureau (CFPB) was designed to remedy some of the consumer protection failures of federal regulators, but the CFPB cannot do the work alone. The CFPB will not and should not adopt new nationwide rules unless a problem is or threatens to become big enough to warrant a national solution. States also bolster the resources of the CFPB and the federal banking agencies. The states have a crucial role to play and that is why Congress reaffirmed and reinvigorated the states' role as part of financial reform.

II. The Proposed Preemption Rules are Inconsistent with the State Role Authorized by the Dodd-Frank Act

In 2004, the OCC adopted broad regulations preempting state laws aimed at abusive bank practices[7] involving mortgages, credit cards, and other areas. The OCC's proposal would effectively continue those regulations without complying with the mandates of the Dodd-Frank Act.

Dodd-Frank specified the limited circumstances under which existing OCC preemption pronouncements may have continued viability, and the proposal exceeds those circumstances (*section II-a below).* Congress rejected the OCC's existing preemption standards, specified what standard must be used, and set up procedural safeguards to enforce that standard (*section II-b).* The proposal ignores the directives in the Dodd-Frank Act, both substantive and procedural (*section II-c).* Finally, the OCC exceeds its authority with respect to preemption of state laws of general applicability (*section II-d).*

a. Dodd-Frank Did Not "Grandfather" Preexisting Regulations: The OCC Must Repeal Its Regulations Because They Violate Dodd-Frank

The OCC asserts that it can reaffirm its broad preemption regulations without subjecting them to the Dodd-Frank requirements because:

> The [Dodd-Frank] Act contains no statement that Congress intended to retroactively apply these procedural requirements to overturn existing precedent and regulations, and that interpretation would be contrary to the presumption against retroactive legislation. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 272-73 (1994).

---

[7] For simplicity, references throughout these comments to "national banks" and the "National Bank Act" apply also to those standards as applied to federal savings associations through the Home Owners Loan Act. *See* Dodd-Frank § 1047.

This statement is wrong on several counts. First, Congress included a very clear statement of when the old regulations apply, and that statement is completely in harmony with traditional rules about retroactivity. Second, while Dodd-Frank "grandfathered" pre-existing *contracts*, it by no means grandfathered pre-existing *regulations*. Third, the Dodd-Frank Act contains both substantive and procedural requirements, and the OCC must comply with both.

In Section 1043 of the Dodd-Frank Act, Congress addressed the "Preservation of Existing Contracts":

> This title, and regulations, orders, guidance, and interpretations prescribed, issued, or established by the [Consumer Financial Protection] Bureau, shall not be construed to alter or affect the applicability of any regulation, order, guidance, or interpretation prescribed, issued, and established by the Comptroller of the Currency or the Director of the Office of Thrift Supervision regarding the applicability of State law under Federal banking law to *any contract entered into on or before the date of enactment* of this Act, by national banks, Federal savings associations, or subsidiaries thereof that are regulated and supervised by the Comptroller of the Currency or the Director of the Office of Thrift Supervision, respectively. (emphasis added)

This provision is quite clear: Title X of Dodd-Frank does not affect the applicability of the OCC's or OTS's otherwise valid preemption regulations as to contracts entered into *on or before* July 21, 2010,[8] but it does affect the applicability of preemption regulations to new contracts.[9] State laws are applicable to new contracts unless they are preempted under the provisions of Title X and any regulations adopted consistent with those requirements.

Section 1043 is consistent with the retroactivity rule of the *Landgraf* case. In *Landgraf,* the Supreme Court held that the damages and jury trial provisions of the Civil Rights Act of 1991 did not apply to a case that was pending on appeal when the statute was enacted. Under both *Landgraf* and Section 1043, a new law does not apply to *conduct* before enactment of that law. The Court did not in any way indicate that *old regulations* were somehow preserved as to *future conduct* notwithstanding their inconsistency with a new statutory standard.

---

[8] The Supreme Court's decisions in *Watters v. Wachovia Bank*, 550 U.S. 1 (2007), and *Cuomo v. Clearing House Assoc'n,* 129 S. Ct. 2710 (2009), did not address, much less resolve, the ongoing dispute over the validity of substantive preemption standards articulated in the 2004 preemption regulations. The extent to which they articulate a valid conflict preemption standard was an open question as of the date of enactment of Dodd-Frank, and remains so today. *See e.g.* Amy Quester and Kathleen Keest, *Looking Ahead After Watters v. Wachovia Bank: Challenges for Lower Courts, Congress, and the Comptroller of the Currency,* 27 Rev. of Banking and Financial Law, 187, 221-227 (2008). The grandfather clause in Dodd-Frank does not retroactively validate those rules, but simply says it does not "alter or affect" the applicability of the rules – whatever their ultimate validity might be as courts continue to have occasion to evaluate them.

[9] Indeed, it is likely that section 1043 grandfathered only contracts entered into prior to July 21, 2010, before the preemption amendments take affect, precisely to avoid a race to more preemption activity in the interregnum.

The OCC characterizes the Dodd-Frank amendments as merely imposing "new procedural and consultation requirements" that have no impact on existing preemption determinations. The agency implies that the new "procedures" need only be applied to new regulations.

But the Dodd-Frank preemption provisions are not merely procedural; they include a new substantive standard along with procedural and judicial review provisions intended to enforce that standard. The ban on field preemption, the prevent/significantly interfere standard, and the "case-by-case" requirement all are substantive changes. They are a statement that, as a general rule, state laws are not preempted except for particular laws that are shown, through substantial evidence on the record, to prevent or significantly interfere with bank powers.

The OCC implicitly acknowledges some change in the substantive standard through the proposed changes to its regulations, but it assumes that it can ignore the aspects of the law that it deems procedural. But there is nothing in the statute or legislative history that indicates that the OCC can cherry pick which of the Dodd-Frank amendments to apply to its regulations. Congress passed the entire package of amendments to undo the broader preemption standards that the OCC had been applying and to ensure that the OCC was faithful to the new preemption standard.

The Dodd-Frank preemption changes would be meaningless if they preserved the prior preemption determinations. Maintaining them in the wholesale manner that OCC now proposes would leave virtually no need for future preemption determinations. Doing so would be inconsistent with Congress's directive, which restores the role of state law in protecting consumers by mandating that the OCC follow a prescribed standard along with prescribed procedures in the limited circumstances where it purports to override state law.

b. Congress Intended to Undo the OCC's 2004 Preemption Regulations

The Dodd-Frank preemption amendments were the result of the ongoing controversy over the OCC's preemption activities in the past decade culminating in the 2004 preemption regulations. The role that preemption played in the financial crisis gave Congress added impetus to rein in preemption. While the preemption amendments were a compromise, both the plain language of the statute and the legislative history show that Congress intended to undo the 2004 regulations and the OCC's past (and continuing) misinterpretation of the *Barnett* standard.

(i) Background: The OCC's 2004 Rules as Stealth Field Preemption

In 1996, the Office of Thrift Supervision (OTS) asserted that the Home Owners Loan Act (HOLA) preempted the field of lending regulation for federal savings associations.[10] The OTS promulgated a regulation preempting all state laws affecting lending, including a long list of "illustrative examples" of types of lending laws that were preempted.[11]

---

[10] The OTS asserted that its enabling statute, HOLA, "occupies the field," thus granting field preemption to federal thrifts. 12 C.F.R. § 560.2(a).

[11] 12 C.F.R. § 560.2(b).

In the years that followed, the OCC competed with the OTS by becoming increasingly aggressive in asserting that the National Bank Act, like HOLA, preempted state laws. The OCC began with opinion letters, amicus briefs and orders aimed at individual laws.[12]

In order to attract more banks to the national bank charter and to compete with the thrift charter, the OCC eventually adopted the 2004 regulations that, in practice if not in word, adopted field preemption as the functional standard for the NBA.[13] The OCC did not explicitly claim field preemption, which would have been inconsistent with 140 years of Supreme Court decisions interpreting the NBA as providing a less sweeping conflict preemption standard.[14] Nonetheless, the broad preemption of entire categories of state laws had the same overall effect.

To accomplish this wide degree of preemption, the OCC effectively read out the words of limitation and degree that repeatedly appear in the Supreme Court's description of the scope of NBA conflict preemption. The Supreme Court consistently uses words that require a certain magnitude of interference: "forbid, or to impair *significantly*, …. prevent or *significantly* interfere with the national bank's exercise of its powers," *Barnett Bank v. Nelson,* 517 U.S. 25, 33 (1996); "prevent or *significantly* interfere… *significantly* impair," *Watters v. Wachovia Bank, N.A.* 550 U.S. 1, 12 (2007) (describing the *Barnett* standard); "*unduly* burdensome and duplicative," *id* at 11; "*significantly* burden" *id* at 13; "impose an *undue* burden," *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944). Words like "significantly" are, in fact, significant. It is implausible to consider that a standard that requires "significant" interference is really meant to also encompass a standard that imposes only a modicum of interference.[15]

Yet in the 2004 rules, the OCC, in its "distillation" of the Supreme Court decisions, eliminated all words requiring some threshold degree of magnitude. Instead, the OCC asserted that state laws that "obstruct, impair or condition" federal bank powers are preempted.[16] It then went on to assert that entire categories of laws covering virtually every

---

[12] *See* National Consumer Law Center, *The Cost of Credit,* § 3.4.6.2 (4th ed. 2009 and Supp.).

[13] As to the effect (and goal) of the 2004 regulations as bestowing field preemption, s*ee generally*, National Consumer Law Center, *The Cost of Credit,* § 3.4.6.3 (4th ed. 2009 and Supp.); Kathleen C. Engel and Patricia A. McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps*, 158, 159 (2011) (OCC was "hungrily eyeing the OTS, eager to give the same competitive advantage to national bank"; by offering preemption, the OCC hoped it could keep national banks from converting to thrift charters).

[14] *See* Lauren Saunders, National Consumer Law Center, "Restore The States' Traditional Role As 'First Responder'" (Sept. 2009), available at http://www.nclc.org/images/pdf/preemption/restore-the-role-of-states-2009.pdf.

[15] On the rare occasions when the Supreme Court has used looser language, it has been in the context of cases that upheld state law or in which the interference was quite substantial.

[16] 69 Fed. Reg. 1904, 1910 (January 13, 2004).

aspect of deposit taking and lending were preempted (regardless of the extent to which they interfered with bank powers).

By eliminating the limiting language, the OCC also eliminated the limiting principles. The broad preemption language together with the broad categories of laws preempted effectively created field preemption. Indeed, the supplemental information to the 2004 preemption rules explained that the OCC was not asserting field preemption of real estate lending rules – and beyond to other authorized bank powers – because the agency concluded "that the effect of labeling of this nature is largely immaterial in the present circumstances."[17] The OCC even parroted the OTS's standard – explicitly based on field preemption – for what state laws survive.[18]

The 2004 rules were a controversial, dramatic change in NBA preemption standards and were the subject of Congressional hearings.[19] Congressman Barney Frank, then ranking minority member of the House Financial Services Committee, introduced the "Preservation of Federalism in Banking Act" to reverse both the OTS's and OCC's overly broad preemption regulations.[20] That proposal was the seed for the Dodd-Frank preemption provisions ultimately adopted.

(ii) Dodd-Frank Mandates a Roll Back of the 2004 Rules to the Prevent/Significantly Interfere Standard

The financial crisis prompted Congress to revisit the preemption regulations. Some, including the OCC, claimed that preemption of state consumer protection laws played no role

---

[17] *Id.* at 1910-1911.

[18] *Compare, e.g.,* 12 C.F.R. § 7.4008(c) (OCC lending preemption regulation: state laws are not preempted "to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers"), *with* 12 C.F.R. § 560.2(c) (OTS lending preemption regulation: state laws are not preempted "to the extent that they only incidentally affect the lending operations of Federal savings associations….").

[19] *See, e.g.* Testimony of Roy Cooper Before the Committee on Banking, Housing and Urban Affairs, *Hearings on the Office of the Comptroller of the Currency's Rules on National Bank Preemption and Visitorial Powers*, 4 (April 7, 2004) ("The OCC has been explicit about trying to entice federal thrifts and state banks to switch their charters to that of a national bank. Eliminating any role for the states is evidently a selling point in their competition with other regulators."); Testimony of Arthur Wilmarth Before the Committee on Banking, Housing and Urban Affairs, *Hearings on the Office of the Comptroller of the Currency's Rules on National Bank Preemption and Visitorial Powers*, 2-3 (April 7, 2004)("The OCC has deliberately crafted its rules to accomplish a sweeping preemption of state laws that is equivalent to the 'field preemption' regime established by the Office of Thrift Supervision…."); *cf.* Opening Statement of Congresswoman Sue Kelley, Subcommittee on Oversight and Investigations, H.R. Committee on Financial Services, *Congressional Review of OCC Preemption*, ("..for a regulator to single-handedly preempt a State's ability to both determine and enforce laws without public debate *or explicit direction from Congress is not only troublesome, but I believe it is careless. … Given the overreaching nature of these regulations*, which appears to be larger than just this one issue, I hope my colleagues in the Subcommittee on Housing and Financial Institutions will continue their own investigations into predatory lending to address these specific concerns.") (Transcript, p. 3, *available at* http://commdocs.house.gov/committees/bank/hba93717.000/hba93717_0.HTM) (emphasis added)

[20] Preservation of Federalism in Banking Act, H.R. 5251, 108th Cong. (introduced Oct. 7, 2004).

in contributing to the crisis. However, Congress heard testimony detailing the myriad harmful effects that preemption had on consumers – and ultimately on the economy – in a wide spectrum of financial services from mortgage lending and credit cards to deposit accounts.[21]

The various proposals to resolve the preemption controversy ran the gamut. At one end of the spectrum, state laws would have been preempted only if they discriminated against national banks or were inconsistent with federal law other than banking statutes, and the OCC would have been given no role in preempting state laws.[22] At the other end of the spectrum, amendments offered by preemption proponents either would have made no change to the banking statutes or would have ratified the OCC's ability to broadly preempt state consumer protection laws.[23]

Compromises narrowed the distance between these extremes. The final bill permitted a limited amount of preemption by the banking statutes and a limited role for the OCC but refused to codify the OCC's preemption approach.

First, Congress explicitly denied both federal banking charters field preemption: neither the NBA nor HOLA "occup[ies] the field in any area of State law."[24] Thus, Congress overturned both the explicit field preemption by OTS and the *de facto* field preemption by the OCC.

Second, Congress dictated that the OCC could preempt state laws only on a "case-by-case basis" by making "a determination … concerning the impact of a *particular* State consumer financial law on any national bank that is subject to that law, or the law of any other State

---

[21] *See, e.g.* Testimony of Prof. Patricia A. McCoy Before the U.S. Senate Committee on Banking, Housing and Urban Affairs, *Hearing on Consumer Protections in Financial Services: Past Problems, Future Solutions"* at 14, 14-24 (Mar. 3, 2009) (banks lobbied OCC to "clothe them with the same federal preemption as federal savings associations", and succeeded with the 2004 preemption rules"); Q&A of Chairman Frank to Witness Michael C. Calhoun, House Committee on Financial Services, *Perspectives on the Consumer Financial Protection Agency,* (September 30, 2009) (Frank notes that it wasn't until 2004 that the OCC engaged in field preemption, and that the burden is on those who want to "maintain broad field preemption" to show there were serious problems before 2004.); Testimony of Lauren Saunders Before the Subcommittee on Monetary Policy, Committee on Financial Services, U.S. House of Representatives, *Hearing on Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve* at 21-26 (July 16, 2009); Testimony of Kathleen Keest, Center for Responsible Lending, Travis Plunkett, Consumer Federation of America, and Edmund Mierzwinski, U.S. PIRG, Before the Committee on Financial Services, U.S. House of Representatives, *Hearing on Regulatory Restructuring: Enhancing Consumer Financial Products Regulation* (June 24, 2009).

[22] H.R. 3126, 111th Cong., Sec. 143 (Introduced July 8, 2009).

[23] For example, Amendment #141, defeated December 9, 2009 in the House Committee on Rules, would, *inter alia*, have preempted a state law that "impairs, or hampers" the business of banking. Other proposals would have eliminated any change to preemption.

[24] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), § 1044, to be codified at 12 U.S.C. § 25b(b)(4). It is made applicable to federal thrifts by Dodd-Frank §1047.

with substantively equivalent terms."[25] The case-by-case requirement was a direct reversal of the OCC's 2004 regulations, which preempted broad categories of state laws without examining the impact of particular state laws.

Third, Congress tightened up the grounds on which the OCC could preempt state law by preventing it from misapplying the *Barnett* test as it had in the past. The evolution of this language demonstrates that, like the no field preemption and case-by-case requirements, the amendment was intended to restrict the OCC's preemption activities and undo the 2004 regulations.

The financial reform bill that passed the House Financial Services Committee used the language of *Barnett* -- "prevents or significantly interferes" – without identifying the case.[26] On the floor, the House explicitly rejected an amendment to give the OCC authority to preempt a state law that merely "impairs or hampers" bank powers, an amendment that would have effectively codified the OCC's weak preemption test.[27] The final compromise language passed in the House version set the standard as "significantly interferes with or materially impairs" the ability of a national bank to exercise its powers.[28]

The bill that passed the Senate Banking committee and the full Senate simply adopted the *Barnett* standard by reference to the case itself, without identifying any particular language from that case.[29] Yet the Senate Committee report made clear that it interpreted *Barnett* as being a roll-back of the OCC's overly aggressive preemption stance. The report explained that "[t]he standard for preempting State consumer financial protection laws would *return* to what it had been for decades, those recognized by the Supreme Court in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996), *undoing broader standards adopted by rules, orders and interpretations issued by the OCC in 2004*."[30]

The final bill includes the reference to the *Barnett* case but gives Congress's interpretation of the standard required by that case and it is Congress's understanding of that standard that governs. The result is a law that allows the OCC some role in preemption, but "only if … in

[25] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(b)(3)(A) (emphasis added).

[26] HR 3126 Committee Print (October, 28, 2009).

[27] A proposed amendment to use language preferred by the OCC and introduced by Congresswoman Bean ("prevents, significantly interferes with, *impairs or hampers…*" was explicitly defeated in the House Rules Committee. Bean Amendment # 141 (December 9, 2009).

[28] H.R. 4173 (Dec. 11, 2009). In a post-passage floor statement, Congresswoman Bean explained her view that the addition of the "materially impairs" language was added to reflect the multiple standards that she (as well as the OCC) views as the *Barnett* test. Remarks by Melissa L. Bean, 155 Cong Rec E 3029, December 16, 2009. Other parties to that compromise had different views of the meaning of "materially impairs," and the language did not survive the final bill.

[29] S. 3217 (April 15, 2010); H.R. 4173 (May 20, 2010).

[30] S. Rep. No. 111-176, at 175 (Apr. 30, 2010) (emphasis added).

accordance with the legal standard for preemption in [*Barnett*], the State consumer financial law prevents or significantly interferes with the exercise of the national bank of its powers ….”[31] Congress unambiguously specifies only one “standard” drawn from *Barnett*.

In the conference committee statement on the final bill, Congress once again made clear its view that “prevent or significantly interfere” is the *Barnett* standard. The conference report noted that “[the Committee] codifies the standard in the 1996 Supreme Court case Barnett Bank of Marion County, N.A. v. Nelson to allow for the preemption of State consumer financial laws that prevent or significantly interfere with national bank’s exercise of their powers.”[32]

Finally, in order to further ensure that the OCC did not misapply the new preemption standard, Congress put in a number of safeguards:

- To ensure that the OCC conduct true case-by-case review and not preempt broad categories of state laws that are “substantively equivalent,” Congress dictated that “the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination” that laws are equivalent.[33]
- To ensure that the OCC did not misapply the preemption test, Congress provided that “No regulation or order” of the OCC shall be applied to invalidate state law “unless *substantial evidence*, made *on the record of the proceeding*, supports the specific finding regarding the preemption of such provision in accordance with the legal standard” of the *Barnett* decision.[34]
- To subject any OCC preemption determinations to further scrutiny, Congress provided that courts should review them using the less deferential *Skidmore* judicial review standard rather than the *Chevron* standard under which courts generally defer to agencies.[35]

Together, these substantive and procedural requirements add up to a complete repeal of the OCC’s preemption regulations.

c. The OCC’s Proposed Regulations Violate the Requirements of the Dodd-Frank Act

[31] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(b)(1)(B).

[32] Joint Explanatory of the Committee of Conference, H. Rept. 111-517 at 875 (June 29, 2010).

[33] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(b)(3)(B).

[34] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(c) (emphasis added).

[35] Dodd-Frank § 1044(a), to be codified at 12 U.S.C. § 25b(b)(5); *see* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

Evaluating the OCC's proposal in light of Dodd-Frank Act requirements is telling. The proposed regulations violate numerous provisions of the Act.

(i) The Proposed Regulations Violate the Ban on Field Preemption and the Requirement for Case-by-Case Preemption Determinations

The OCC's proposal to continue its broad preemption regulations with only modest changes violates the ban on field preemption and the requirement for case-by-case preemption determinations.

The deposit-taking regulation would continue to state that a "national bank may exercise its deposit-taking powers without regard to state law limitations concerning" the identical list of categories that are currently preempted: abandoned and dormant accounts; checking accounts; disclosure requirements; funds availability; savings account orders of withdrawal; state licensing or registration requirements (except for purposes of service of process); and special purpose savings services.[36] While the OCC proposes to delete an introductory sentence to this provision,[37] the OCC makes no changes to the substance of what is preempted and continues to effectively preempt the field of laws affecting deposit-taking.

The non-real estate lending regulation would continue to state that a "national bank may make non-real estate loans without regard to state law limitations concerning" an unchanged list of categories: licensing, registration and reports; creditor requirements for insurance for collateral or other credit enhancements or risk mitigants; loan-to-value ratios; the terms of credit; escrow and impound accounts; security property, including leaseholds; access to, and use of, credit reports; disclosure and advertising; disbursements and repayments; and rates of interest on loans.[38] Except for the deletion of the introductory sentence, this regulation too is identical to the broad field preemption regulation currently in effect.

The real-estate lending regulation would also continue to state that a "national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning" the identical list of categories as before.[39] Those categories are similar to the non-real estate lending regulation, and include mortgage servicing.

---

[36] Proposed 12 C.F.R. § 7.4007(b).

[37] The OCC proposes to delete the introductory sentence: "Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks." 12 C.F.R. § 7.4007(b)(1). The impact of the removal of that sentence is discussed in the next section.

[38] Proposed 12 C.F.R. § 7.4008(d).

[39] Proposed 12 C.F.R. § 34.4(a).

The OCC's proposal would repeal in its entirety only one of the 2004 preemption rules – the one applicable to "incidental" bank powers.[40] We strongly support this repeal, but the OCC must likewise repeal the broad deposit-taking and lending field preemption regulations.

By proposing to continue the broad preemption of state laws affecting deposit-taking and lending, the OCC would violate several Dodd-Frank requirements:

- The OCC continues to preempt the field;
- The OCC has failed to conduct a case-by-case review of particular state laws;
- The OCC has failed to conduct a proceeding with substantial evidence on the record;
- The OCC has failed to analyze what state laws are substantively equivalent to particular ones that are preempted;
- The OCC has failed to consult with the CFPB in extending preemption beyond particular state laws to equivalent ones.[41]

As discussed in the next section, the OCC also fails to explain how the state laws that are being preempted prevent or significantly interfere with bank powers or otherwise are preempted under the *Barnett* case.

In sum, the OCC ignores every element of the NBA amendments that dictate when the OCC can and cannot preempt state law. Consequently, the continuation of the 2004 preemption regulations, as amended, is outside of the OCC's authority except as authorized by section 1043's grandfather clause. The OCC's regulations are completely inconsistent with the Dodd-Frank Act requirements, which were adopted for the purpose of "undoing broader [preemption] standards adopted by rules, orders and interpretations issued by the OCC in 2004."[42]

(ii) The OCC Has Failed to Apply the Prevent or Significantly Interfere Standard, and the OCC's Application of Barnett Distorts the Congressional Standard

The OCC proposes modest changes to two sections of its regulations: those governing laws that are preempted, and those governing laws that are not preempted. Neither set of changes is sufficient to comply with the requirements of Dodd-Frank. The OCC makes no pretense of applying the prevent/significantly interfere standard, or even the *Barnett* case as interpreted by the OCC, to state laws governing deposit-taking or lending. While it purports to apply the *Barnett* standard to general laws, it fails to incorporate the entire congressional standard.

---

[40] 76 Fed. Reg. at 30571, removing 7.4009.

[41] Dodd-Frank, § 1044, to be codified at 12 U.S.C. § 25b((b)(1)(B), (b)(3). Though there is a delayed implementation date for specified functions, the CFPB was created as of the date of enactment, Dodd-Frank, §1018, and the Treasury Department has been exercising its early powers until a Director is in place. The OCC could have, but did not, consult with the Treasury CFPB Implementation Team.

[42] S. Rep. No. 111-176, at 175 (Apr. 30.2010) (emphasis added).

Taken together, the OCC's inadequate changes leave the preemption regulations largely untouched, in violation of the new preemption standard.

First, the OCC proposes to delete one sentence in the introductory paragraph of the deposit-taking, lending, and real-estate lending preemption regulations. That sentence currently provides that state laws that "obstruct, impair or condition" a bank's activities are preempted.[43]

Although we support the deletion of these words from the rule, Dodd Frank requires more. The OCC has continued to assert both its ability and intention to apply the broader preemptive concepts those words describe. The OCC asserts that precedent based on the "obstruct, impair or condition" language "remains valid."[44] The OCC's explanation for deleting those words is not that they stated an overbroad standard in light of Dodd-Frank, but rather that they "created ambiguities and misunderstandings."[45]

As discussed above, the rules would continue to preempt the same broad categories of state laws. The OCC merely asserts, with no justification or explanation: "We have reviewed [the OCC preemption rules] … to confirm that the specific rules are consistent with the standard for conflict preemption in the Supreme Court's Barnett decision." The OCC has no basis to categorically pronounce that *any* state law in the listed categories (including, for example, mortgage servicing laws) prevents or significantly interferes with bank powers.[46] The OCC does not even include any basis to support its assertion that its standards are consistent with the *Barnett* decision.

Second, the OCC proposes to amend the language governing state laws that are *not* preempted. Currently, those regulations provide that general laws such as contract and torts laws, and any other law that the OCC determines, are not preempted to the extent that they have only an "incidental" affect on bank powers.[47] The OCC proposes instead that such laws would not be preempted to the extent consistent with the *Barnett* decision.

---

[43] The OCC proposes to delete 12 C.F.R. § 7.4007(b)(1) (deposit taking), § 7.4008(d)(1) (non-real estate lending) and § 34.4(b) (real estate lending).

[44] The OCC claims: "This language was drawn from an amalgam of prior precedents …. To the extent any existing precedent cited those terms in our regulations, that precedent remains valid, since the regulations were premised on principles drawn from the Barnett case." 76 Fed. Reg. at 30563.

[45] 76 Fed. Reg. at 30563.

[46] For example, the OCC continues to assert that *any* state law governing abandoned and dormant accounts is preempted. The OCC drops a footnote to exclude state laws of the type upheld by the United States Supreme Court in Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944), which obligate a national bank to "pay [deposits] to the persons entitled to demand payment according to the law of the state where it does business." Id. at 248-249. But there would be no need for that footnote if the general rule were consistent with Supreme Court caselaw. The Supreme Court has reviewed very few state laws and the OCC cannot preempt every state law that has not been upheld by the Court.

[47] *See* 12 C.F.R. §§ 7.4007(c), 7.4007(c)(8), 7.4008(e), 7.4008(e)(8), 34.4(b), 34.4(b)(9).

While we support the removal of "incidental" effect test, the reference to the *Barnett* case alone is insufficient; the proposed regulation nowhere adopts the specific "prevents or significantly interferes" language mandated by Dodd-Frank. Critically, in explaining the omission of the mandatory language from the proposed rules, the agency essentially repeats the same interpretation of *Barnett* that it invoked in promulgating the weaker standard in 2004.

In the Supplementary Information, the OCC denies that "prevents or significantly interferes" *is* the test to be applied, although the statute expressly and unambiguously states that it is. Instead, the agency asserts that *Barnett* allows for "different formulations" and that the specified language is merely "one exemplary formulation." OCC claims that, while that articulation of the prevent/significantly interfere test "may serve as a touchstone or a starting point in the analysis….the analysis may not simply stop and isolate those terms from the rest of the decision."[48] Instead, the OCC claims it is appropriate to look at what it terms as "the whole" of *Barnett* and to consider other formulations of conflict preemption.[49]

The OCC's proposal makes clear that the agency intends to preserve the same degree of power to preempt state laws – whether state consumer financial laws, or laws of general applicability[50] – that the OCC assumed in the past. This approach is not permitted by Dodd-Frank.

Congress directed the OCC to apply *Barnett* as interpreted and directed by Congress, not to parse *Barnett* for alternative formulations. Congress was reacting to the OCC's 2004 claim that the "obstruct, impair or condition" language reflected the "variety of formulations" that the Supreme Court quoted in *Barnett*.[51] Read against the backdrop of the 2004 rulemaking, the OCC's current statement of intent to apply "the whole" of *Barnett* in making its future preemption determinations sounds like a declaration that it will continue to use the same standard it has in the past irrespective of what Congress says. In Dodd-Frank, Congress rejected the OCC's prior reading of the *Barnett* standard. Congress has instructed the agency to use the "prevents or significantly interferes" standard stated in Act, and the agency must now do so.

Statutes must be interpreted to "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[52] In deliberating dropping the words "prevent or

[48] 76 Fed. Reg. at 30562-63.

[49] Id.

[50] As discussed in section II(d) below, the Dodd-Frank Act does not give the OCC any preemption power over general state laws.

[51] *See, e.g.*, 69 Fed. Reg. 1904, 1910-11 (Jan. 13, 2004).

[52] Montclair v. Ramsdell, 107 U.S. 147, 152 (1883); *accord* Safeco Ins. Co. of Amer. v. Burr, 551 U.S. 47, 60 (2007).

significantly interfere" from the *Barnett* reference, the OCC would violate the rule against "rendering superfluous" any statutory language.[53] It was no accident that Congress included that phrase, and it was no accident that it referred to it as "the legal standard" in the singular case.

The OCC has no authority to defy the explicit mandate reflected in the law. The regulation should codify the statutory standard. The final rule, when promulgated in accord with all of Dodd-Frank's procedural requirements, should drop all discussion in the explanatory material that claims or suggests that weaker standards under the OCC's versions of alternative formulations have any continuing validity, except as applied to pre-existing contracts within the scope of Section 1043's grandfather clause.

d. The OCC Has No Authority To Preempt State Laws of General Applicability

The OCC's proposed rules continue to list laws of general applicability, such as contracts and torts, as applicable to national banks.[54] But the regulation appears to assert that state laws, other than those specifically listed, are preempted unless the OCC determines them to be applicable to national banks. As amended, the list of generally non-preempted state laws includes specified categories of general laws, such as contracts, torts, *plus*

> [a]ny other law *that the OCC determines to be applicable to national banks* in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al. 517 U.S. 25 (1996), or that is made applicable by Federal law.[55]

However, the OCC has no authority to determine preemption of state laws other than state consumer financial laws.

In Dodd-Frank, Congress clarified where and on what terms state laws are preempted. Apart from the explicit usury preemption provision in the NBA[56] and state laws that discriminate against national banks, the new provisions governing "state consumer financial laws" are the only place in the NBA where Congress specified that state law is preempted or gave the OCC any authority to issue preemption regulations.[57]

---

[53] Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

[54] *See* 12 C.F.R. 7.4007(c) (deposits); 7.4008(e) (non-real estate lending); 34.4(b) (real estate lending) for categories of state laws that are presumptively not preempted, and therefore applicable to national banks, except as the OCC deems otherwise.

[55] 76 Fed. Reg. 30557, 30571-73 (May 26, 2011) (amending 12 C.F.R. §§ 7.4007(c)(8), 7.4008(e)(8), 34.4(b)(9)) (emphasis added).

[56] 12 U.S.C. § 85.

[57] General principles of statutory construction strongly suggest that Congress' decision to make the scope of OCC's preemptive authority explicit as to only one category of state laws reflects an intent not to extend authority beyond those circumstances. This conscious decision by Congress is especially important against the

Dodd-Frank's silence on laws other than state consumer financial laws cannot be construed as an implicit delegation of authority to preempt such laws. Congress did not address general state laws because the OCC has generally not asserted preemption of those laws. Congress's silence about any preemption of state laws other than consumer financial laws, coupled with its awareness that even the OCC has taken the position that such laws are generally not preempted, is "powerful evidence" that the NBA does not preempt such laws.[58]

State laws other than state consumer financial laws may only be preempted under traditional Supremacy Clause principles. Congress gave the OCC no role in applying those principles. It would be an absurd result to read Dodd-Frank's silence on laws of general applicability to make them *more* vulnerable to preemption, without the substantive and procedural protections that state consumer financial protection laws receive, when there was – and still is – a consensus that banks should comply with such laws.

III. The Visitation Regulations Must Be Revised

The proposed regulations make changes to the visitorial powers regulation, section 7.4000, in response to the changes in Section 1047 of Dodd-Frank. That section addresses the circumstances under which states may take enforcement actions against national banks. Here again, the proposed rule inappropriately changes Congress's terminology, deviating from the statutory meaning. It further fails to make more extensive changes to section 7.4000 that are necessary to conform to the *Cuomo* decision[59] and Dodd-Frank.

The OCC proposes to continue the portion of Section 7.400's general rule that reads: "State officials may not exercise visitorial powers with respect to national banks, such as … prosecuting enforcement actions, except in limited circumstances authorized by federal law." However, *Cuomo* makes clear that "the Comptroller erred by extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions.'"[60] State enforcement actions are simply not a visitorial power. Therefore, the visitorial powers rule cannot restrict state enforcement actions to limited circumstances.

The proposed regulation also adds to the lists of visitorial powers: "investigating or enforcing compliance with any applicable federal or state laws concerning those activities."[61] Although the Supreme Court in *Cuomo* held that states may not enforce pre-litigation

---

backdrop of the debate over administrative agency preemption generally, *see, e.g.* Nina A. Mendelson, *A Presumption Against Agency Preemption,* 102 Northwestern U. L. Rev. 695 (2008), and the Supreme Court's recent decisions in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), and *Cuomo,* both rejecting administrative preemption in those cases.

[58] Wyeth v. Levine, 129 S.Ct. 1187, 1200 (2009).

[59] *Cuomo v. Clearing House Assn., L.L.C.*, 129 S. Ct. 2710 (2009).

[60] *Id.* at 2721.

[61] 76 Fed. Reg. at 30562 (proposed 12 C.F.R. § 7.4000(a)(2)(iv).

investigative subpoenas against national banks, it did not hold that every possible type of investigation is prohibited visitation. For example, states could collect complaints from consumers or research the public records without running afoul of the exclusive visitation provision of the NBA. Consequently, a broad rule prohibiting states from investigating compliance with applicable laws is unwarranted and section 7.4000(a)(2)(iv) should be removed in its entirety.

These problems are not cured by adding, as a permissible activity, the following exception to the general rule:

> In accordance with the decision of the Supreme Court in Cuomo v. Clearing House Assn., L. L. C., 129 S. Ct. 2710 (2009), an action against a national bank in a court of appropriate jurisdiction brought by a state attorney general (or other chief law enforcement officer) to enforce a non-preempted state law against a national bank and to seek relief as authorized thereunder is not an exercise of visitorial powers under 12 U.S.C. 484.[62]

Dodd-Frank amends the NBA to permit states "to enforce an *applicable* law and to seek relief as authorized by such law."[63] The OCC changes the word "applicable" to "non-preempted state law."[64] While the claim at issue in *Cuomo* involved state law, the OCC's past efforts to undermine states' rights to enforce federal law were in mind when Congress specifically chose not just to codify the *Cuomo* case but to use the term "applicable" law, rather than refer solely to non-preempted state laws.[65] The OCC has no authority to change the words that Congress used to narrow the type of state enforcement that Congress authorized. The OCC should replace the words "non-preempted state" with "applicable" to conform its regulation to the statute.

Finally, OCC should delete section 7.4000(a)(2)(iii), which prohibits "regulation and supervision of activities authorized or permitted pursuant to federal banking law." The regulation already bars supervisory activities such as examination of a bank, but the broad bar on any regulation or supervision could be read to preempt state laws and regulations that do not constitute visitation and are not preempted under the Dodd-Frank standard.

---

[62] 76 Fed. Reg. at 30564 (proposed 12 C.F.R. § 7.4000(b)).

[63] Dodd-Frank § 1047, to be codified at 12 U.S.C. § 25b(i)(1) (emphasis added).

[64] 76 Fed. Reg. at 30564 (proposed 12 C.F.R. § 7.4000(b).

[65] *See, e.g. Minnesota ex rel Hatch v. Fleet Mortgage*, 181 F. Supp. 995 (D. Minn. 2001) (OCC filed amicus on behalf of national bank operating subsidiary to prevent state enforcement of federal Telemarketing Sales Rule); Testimony of Prentiss Cox Before U.S. House Rep. Committee on Energy and Commerce, p. 2 n. 2 "*The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC,*" (July 8, 2009) http://republicans.energycommerce.house.gov/Media/file/Hearings/CTCP/070809_Consumer_Financial_Protection_Agency/Cox.Testimony.pdf.

IV. The OCC Appropriately Repeals the Subsidiary Preemption Provision

Congress reversed the Supreme Court and the OCC by directing that operating subsidiaries of national banks are fully subject to state law. The OCC's proposal to repeal 12 C.F.R. § 7.4006 is consistent with that directive and we support it.

V. Conclusion

The OCC's insistence on continuing its broad preemption of state law ignores the mandate of the Dodd-Frank Act. State laws that protect consumers from abusive bank conduct without preventing or significantly interfering with national bank powers are not preempted under the Dodd-Frank preemption standard. The OCC cannot preempt state laws as applied to contracts entered into after July 21, 2010 without following the standards and procedures of the Dodd-Frank Act. The OCC's reaffirmation of its broad preemption regulations without regard to any of the Dodd-Frank limitations cannot withstand scrutiny.

Yours very truly,

Center for Responsible Lending
Consumers Union
National Consumer Law Center (on behalf of its low income clients)
Public Citizen
Sargent Shriver National Center on Poverty law

EXHIBIT 5

Comments of the
NATIONAL CONSUMER LAW CENTER[1]
on behalf of its Low Income Clients
and
PUBLIC CITIZEN[2]
on

Office of the Comptroller of the Currency
Interim Final Rule On
Office of Thrift Supervision Integration Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act
RIN 1557-AD47
Docket ID OCC-2011-0016
76 Fed. Reg. 48950 (Aug. 9, 2011)

Submitted Oct. 11, 2011

Thank you for the opportunity to comment on the Interim Final Rules integrating the Office of Thrift Supervision (OTS) pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).

We are writing to comment on the rule preempting state laws as applied to a federal savings association that acts as a fiduciary, including as trustee, executor, administrator or guardian. The fiduciary preemption rule is outside of the authority of the Office of the Comptroller of the Currency (OCC) under the Home Owner's Loan Act (HOLA) and the Dodd-Frank amendments to that Act. The OCC has offered no justification for preempting important consumer protections governing services to persons who have put their trust in a fiduciary, especially in an area traditionally governed by state law where there appear to be no federal standards that apply.

I. The Interim Rule Preempts a Broad Swath of State Laws Governing Trustees, Executors, Administrators, Guardians and Other Fiduciaries

The OCC recognizes that the Dodd-Frank amendments to HOLA require that OTS preemption rules be revisited. We support the Interim Final Rules to the extent that

[1] The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, providing legal expertise on consumer law issues to public and private attorneys, policy makers, and consumer advocates across the country, with a special focus on low-income consumers. NCLC publishes a series of 18 practice treatises consumer laws, including Cost of Credit: Regulation, Preemption and Industry Abuses. NCLC's attorneys have been closely involved with the enactment of and regulations under virtually all federal laws affecting consumer credit since the 1970s. These comments were written by Lauren Saunders.
[2] Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen is concerned that the OCC's interim final rule would oust critical consumer protections afforded by state law and state officials' enforcement efforts.

they remove certain "occupation of the field" statements on federal preemption and replace a number of OTS preemption rules with a simple statement that federal savings associations are governed by the same preemption rules as national banks. These changes are dictated by provisions of Dodd-Frank that clarify that HOLA does not occupy the field in any area of state law,[3] and that the preemption standards applicable to federal savings associations are those applicable to national banks.[4]

Yet the OCC strays from this approach without explanation with regard to the preemption of state laws governing fiduciary operations.[5] The Interim Final Rule provides that "the OCC intends to give Federal savings associations maximum flexibility to exercise their fiduciary powers in accordance with a uniform scheme of Federal regulation. Accordingly, Federal savings associations may exercise fiduciary powers as authorized under Federal law, including this part, without regard to state laws that purport to regulate or otherwise affect their fiduciary activities, except to the extent provided in 12 U.S.C. 1464(n) …"[6]

The rule preempts a wide variety of state laws governing fiduciaries, including those covering:

- Fiduciary qualifications, registration and annual reporting;
- Duties of fiduciaries to their beneficiaries, including the duty of loyalty and the duty of care (e.g., the prudent investor rule);
- Requirements to maintain a place of business within the state if they wish to provide services to beneficiaries in that state, or if they wish to file suit in a court of that state;
- Disclosure by fiduciaries of their financial strength and any relevant conflicts of interest;
- Advertising and marketing by fiduciaries;
- Fees that fiduciaries may charge for various types of services; and
- The types of activities in which fiduciaries may or may not engage.[7]

These are all important protections that have no counterpart in federal law. Activities that would be free of state law protections include acting as a guardian for the elderly or disabled, management of trust accounts (such as a trust for a family farm divided among children), investment decisions and investment advice to trust beneficiaries, administration of an inter vivos trust or a testamentary trust for the benefit of the designated beneficiaries, and handling of wills and estates.

---

[3] 12 U.S.C. § 1465(b).
[4] 12 U.S.C. § 1465(a).
[5] The OCC also republished, without change, Parts 190 (preemption of state usury laws) and 191 (preemption of state due-on-sale clauses). We do not comment on those regulations but note that they rely on additional statutory authority not available for the preemption of state fiduciary laws.
[6] 12 C.F.R. § 150.136(a).
[7] *See* 12 C.F.R. § 150.136(b).

II. The Fiduciary Preemption Rule Exceeds the OCC's Authority Under HOLA as Amended by Dodd-Frank

OTS preemption determinations under HOLA cannot be carried over wholesale to the OCC. HOLA's preemptive effect has been amended and the regulations must be changed so that they are consistent with the OCC's current authority. The OCC offers no justification for this sweeping preemption of fiduciary laws, and does not explain the source of its authority.

A. OCC Cannot Occupy the Field

As noted above, the OTS's position that it was entitled to occupy the field and sweepingly preempt state laws in various areas was repudiated by Dodd-Frank. Yet the OCC views this amendment as meaningless, requiring only cosmetic changes to the OTS fiduciary preemption rule. The interim final rule removes the "occupy the field" statement from the regulation without making *any* substantive changes. The rule still occupies the field of state fiduciary law; it simply does not announce that it is doing so.

Without any authority under HOLA to occupy the field,[8] preemption can only be justified based on traditional preemption principles or the Dodd-Frank preemption requirements. Neither justifies the fiduciary preemption rule.

B. The Same Preemption Standards Apply to Federal Savings Associations and National Banks

HOLA now provides:

> *Any* determination by a court or by the Director or any successor officer or agency regarding the relation of State law to a provision of this chapter or any regulation or order prescribed under this chapter shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.[9]

"This chapter" is all of HOLA.[10] Notably, this provision applies to preemption of *any* state law, not merely state consumer financial laws that have special preemption rules.[11]

The OCC blatantly ignores this requirement. While it appropriately incorporates National Bank Act (NBA) preemption rules in other parts of the Interim Final Rule, it adopts a preemption standard for fiduciary activities by federal savings associations that is the exact oppose of the NBA standard. There is no fiduciary preemption rule for national banks. They may only act as fiduciaries "when not in contravention of State or local law."[12]

---

[8] HOLA did not justify occupying the field even before the Dodd-Frank amendments.
[9] 12 U.S.C. § 1465(a) (emphasis added).
[10] *See* 12 U.S.C. § 1461.
[11] *See* 12 U.S.C. § 25b.
[12] 12 U.S.C. §92a.

Though there are slight differences between the HOLA and NBA provisions authorizing fiduciary activities, the HOLA provision is consistent with the Dodd-Frank mandate that the same preemption rules apply to both. The HOLA fiduciary provision does not preempt state law and in fact ties federal savings associations' fiduciary powers to the authority of state entities "to act under the laws of the State in which the Federal savings association is located."[13]

Under standard rules of statutory construction, the clear, specific and more recent Dodd-Frank provision governing the equivalent preemption standards for national banks and federal savings associations governs over any possible indirect implication that the OCC has the power to impose a different preemption standard for fiduciary activities by federal savings associations.

C. The OCC Has Not Followed the Preemption Standards for State Consumer Financial Laws

States have a variety of laws governing fiduciary activities, many of which qualify as "state consumer financial laws" under Dodd-Frank.[14] Certainly many activities by trustees, executors, administrators, guardians and other fiduciaries involve "accounts" or "financial transactions" that are "directly and specifically" regulated "with respect to a consumer."[15]

Yet the OCC makes no attempt to comply with the Dodd-Frank requirements. The OCC can preempt State consumer financial laws under HOLA "*only if*"[16] it finds that, "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers."[17] Further, the OCC can issue a preemption regulation only on a "case-by-case basis" by determining "the impact of a particular State consumer financial law" or one with "substantively equivalent terms";[18] after consulting with the Consumer Financial Protection Bureau;[19] and after finding that "substantial evidence, made on the record of the proceeding" supports the "specific finding" that the *Barnett Bank* prevent/significantly interfere standard has been met.[20]

---

[13] 12 U.S.C. § 1464(n)(1).
[14] 12 U.S.C. § 25b(a)(2).
[15] *Id.*
[16] 12 U.S.C. § 25b(b)(1). State laws are also preempted if they have a discriminatory effect on federal savings associations or if they conflict with federal laws other than HOLA. *Id.* There is no suggestion that either of those circumstances is present for the fiduciary laws being preempted.
[17] *Id.* § 25b(b)(1)B).
[18] *Id.* § 25b(b)(3)(A).
[19] *Id.* § 25b(b)(3)(B).
[20] *Id.* § 25b(c).

The OCC has not followed any of these requirements. It has not reviewed any particular state laws on a case-by-case basis; has not applied the prevent/significantly interfere *Barnett Bank* standard; has not consulted with the CFPB; and has not conducted a proceeding with substantial evidence on the record.

In a prior preemption rulemaking, the OCC claimed that it could ignore Dodd-Frank because Congress did not intend to apply the Dodd-Frank amendments retroactively to overturn existing regulations.[21] The OCC ignored the clear grandfather clause that preserves prior regulations only as to contracts entered into before the effective date of Dodd-Frank.[22] If Dodd-Frank did not apply to earlier regulations, the OCC would have no need to remove the "occupy the field" statements from the OTS regulations or to harmonize the federal savings association preemption standards in other areas to the national bank standards. The OCC gives no explanation as to why it can pick and choose among which Dodd-Frank requirements it will follow.

III. Conclusion

The OCC's fiduciary preemption rule ignores Congress's clear instructions, and the interim final rule is outside of the OCC's authority. The OCC should rescind the fiduciary preemption regulation and replace it with a statement that fiduciary activities by federal savings associations are preempted to the same extent as they are for national banks.

[21] *See* 76 Fed. Reg. 30557, 30563 & n.28 (May 26, 2011).
[22] *See* 12 U.S.C. § 5553. This issue is discussed in greater detail in our comments on the first round of OTS integration preemption rules, available at http://www.nclc.org/images/pdf/preemption/occ-preemption-comments-6-27-11.pdf.